

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

BILL: CS/SB 634

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Brandes

SUBJECT: Guardianship

DATE: February 11, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	Fav/CS
2.			JU	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 634 revises various provisions relating to Florida guardianship law. The bill:

- Redefines the term “audit” requiring various practices that meet professional standards.
- Requires a nonprofessional guardian to submit to a credit history investigation and background screening.
- Allows courts to order an accounting of property or a trust of which the ward is a beneficiary but which is not under the administration or control of the guardian.
- Authorizes clerks of court to obtain and review records impacting guardianship assets and, upon application to the court, issue subpoenas.
- Allows the court to remove a guardian for failure to submit records during an audit.
- Requires a person seeking a guardianship appointment to acknowledge arrests covered by a sealed record.
- The bill is not expected to have a fiscal impact and has an effective date of July 1, 2014.

II. Present Situation:

Guardianships serve as a mechanism to protect vulnerable individuals in our society who do not have a family or loved or who is willing and able to manage their property or other personal matters. A guardian may be court-appointed, surrogate decision-maker who makes personal or financial decisions for a minor or for an adult with mental or physical disabilities. A guardian may be described as a person “who has the legal authority and duty to care for another’s person

or property, esp[ecially] because of the other’s infancy, incapacity, or disability.”¹ Guardianships are governed completely and exclusively under statutes in Florida.² Any adult may petition a court to initiate guardianship proceedings to determine the incapacity of any person.³ An “incapacitated person” is a “person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person.”⁴

A guardian is a surrogate decision-maker appointed by the court to make personal or financial decisions for a minor or an adult having mental or physical disabilities.⁵ Under Florida law, a ward is defined as a person for whom a guardian has been appointed.⁶

The procedure to determine an alleged person’s incapacity is prescribed by statute.⁷ Any person may file, under oath, a petition in circuit court for determination of incapacity alleging that a person is incapacitated.⁸ After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.⁹ If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.¹⁰ If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing, the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.¹¹

Guardians

Upon a finding by the court that a guardianship sufficiently addresses the problem of the incapacitated person, a guardian will be appointed. There are many different types of guardians available for court appointment such as “limited guardian,” “nonprofit guardian,” “preneed guardian,” and “professional guardian.” A “professional guardian,” is any guardian who has at any time rendered services to three or more wards as their guardian.¹² A professional guardian must comply with statutory application, bond and educational requirements. Each professional guardian must allow, at the guardian’s expense, an investigation of the guardian’s credit history, and the credit history of employees of the guardian, in a manner prescribed by the Department of

¹ BLACK’S LAW DICTIONARY (9th ed. 2009).

² *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So.2d 176, 182 (Fla 2d DCA 1966).

³ Section 744.3201, F.S.

⁴ Section 744.102(12), F.S.

⁵ *See e.g.*, s. 744.102(9), F.S.

⁶ Section 744.102(22), F.S.

⁷ Section 744.331, F.S.

⁸ *Id.* In Florida, circuit courts have exclusive jurisdiction of proceedings relating to the determination of incompetency.

Section 26.12(2)(b), F.S.

⁹ Section 744.331(3), F.S.

¹⁰ Section 744.331(4), F.S.

¹¹ *See s.* 744.331(6)(b), F.S.

¹² Section 744.012(17), F.S.

Elder Affairs.¹³ Each professional guardian shall allow a level 2 background screening of the guardian and employees of the guardian in accordance with the provisions of s. 435.04, F.S.¹⁴ Any resident of this state who is sui juris (someone with full legal rights or capacity and not under any legal disability or power of another such as guardianship) and is 18 years of age or older is qualified to act as a guardian of the ward.¹⁵ A nonresident of the state may serve as a guardian of a resident if he or she is:

- Related by lineal consanguinity to the ward;
- A legally adopted child or adoptive parent of the ward;
- A spouse, brother, sister, uncle, aunt, niece, or nephew of the ward, or someone related by lineal consanguinity to any such person, or
- The spouse of a person otherwise qualified under this section.¹⁶

Every prospective guardian must complete an application for appointment as a guardian. The application must list the person's qualifications to serve as a guardian.¹⁷ If the guardian appointed by the court does not meet the definition of "professional guardian," the guardian may be considered a nonprofessional guardian. The court may require a nonprofessional guardian and shall require a professional or public guardian, and all employees of a professional guardian who have a fiduciary responsibility to the ward, to submit, at their own expense, to an investigation of the guardian's credit history and to undergo level 2 background screening as required under s. 435.04, F.S.¹⁸ For nonprofessional guardians, the court shall accept the satisfactory completion of a criminal history record check. The nonprofessional guardian can satisfy this requirement by undergoing a state and national criminal history record check using fingerprints. The nonprofessional guardian shall have his or her fingerprints taken and provide them to the Department of Law Enforcement with the appropriate fee for processing. The results shall be forwarded to the clerk of the court, maintained in the nonprofessional guardian's file and made available to the court.¹⁹ A guardian may be removed for reasons set forth in the law and the removal shall be in addition to any other penalties prescribed by law.²⁰

Annual Accounting

Each guardian of the property of the ward must file an annual accounting with the court.²¹ The annual accounting must include a full and correct account of the receipts and disbursements of all of the ward's property over which the guardian has control and a statement of the ward's property on hand at the end of the accounting period; however, this does not apply to any property or trust of which the ward is a beneficiary but which is not under the control or administration of the guardian.²²

¹³ Section 744.1085(4), F.S.

¹⁴ Section 744.1085(5), F.S.

¹⁵ Section 744.309(1), F.S.

¹⁶ Section 744.309(2), F.S.

¹⁷ Section 714.312(1), F.S.

¹⁸ Section 744.3135(1), F.S.

¹⁹ Section 744.3135(3), F.S.

²⁰ Section 744.474, F.S.

²¹ Section 744.3678(1), F.S.

²² Section 744.3678(2)(a), F.S.

Responsibilities of the Clerk of the Court

In addition to the duty to serve as the custodian of the guardianship files, the clerk shall review each initial and annual guardianship report to ensure it contains information about the ward that addresses mental and physical health care, physical and mental health examinations, personal and social services, residential setting, the application of insurance, private benefits and government benefits and the initial verified inventory or the annual accounting.²³ The clerk has certain timeframes within which to review reports, audit verified inventory and accountings and report to the court when a report is not timely filed.²⁴

Court-ordered Sealing of Criminal Records

Any court of competent jurisdiction may order a criminal justice agency to seal the criminal history records of a minor or an adult under certain circumstances. The person seeking to seal a criminal history must apply for and receive a certificate of eligibility for sealing.²⁵ When a court orders a criminal history record of a minor or an adult to be sealed, they may lawfully deny or fail to acknowledge the arrests covered by the sealed records except under certain circumstances.²⁶

III. Effect of Proposed Changes:

Section 1 amends s. 744.102(2), F.S., the definition of “audit,” by expanding the term beyond the systematic review of financial and other documents to ensure compliance with court rules and generally accepted accounting principles to include, but not be limited to, various practices that meet professional standards such as reviews of substantiating papers and accounts, interviews and hearings, inspections and investigations.

Section 2 amends s. 744.3135(1), F.S. to require all guardians (other than corporate guardians) submit, at their own expense, to an investigation of the guardian’s credit history and undergo a level 2 background screening pursuant to s. 435.03, F.S. The cost of the credit history and level 2 background screening may be insignificant on nonprofessional guardians as they already pay any fees to undergo state and national criminal history checks and fingerprinting. If appointed, a nonprofessional guardian may petition the court for reimbursement of reasonable expenses incurred for credit history investigation and background screening.

Section 3 amends s. 744.3678(2)(a), F.S. to provide authority to the court to order an annual accounting for any property or any trust of which the ward is a beneficiary but is not under the control or administration of the guardian.

Section 4 creates a new ss. 744.368(2), F.S. which expands the purview of the clerk of the court at the direction of the court to obtain and review records and documents that reasonably impact guardianship assets, including beginning inventory balances and fees charged to the guardianship. This section also allows the clerk to apply to the court to exercise the power to

²³ Section 744.368(1), F.S.

²⁴ Section 744.368, F.S.

²⁵ Section 943.059, F.S.

²⁶ Section 943.059(4)(a), F.S.

issue and serve subpoenas to parties and nonparties, provide proper notice to the guardian or ward and compel production of documents and other evidence. It also includes a process whereby a guardian or ward may object to the production of documents.

Section 5 amends s. 744.474, F.S. to provide that the failure to submit guardianship records during the audit as required allows for the removal of a guardian.

Section 6 amends s. 943.059, F.S. to require a person seeking appointment as a guardian to disclose arrests covered by a sealed record.

Section 7 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issue:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Nonprofessional guardians currently pay the costs for fingerprinting and background checks. The cost to require nonprofessional guardians to be subject to a credit history investigation and level 2 background screening is indeterminate. However, if appointed, a nonprofessional guardian may petition the court for reimbursement of reasonable expenses incurred for the investigation of the credit history and level 2 background screening.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 744.102, 744.3135, 744.3678, 744.368, 744.474, and 943.059.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families, and Elder Affairs on February 11, 2014:

- Provides additional responsibilities for the clerk of the court if there is reason to believe further review of records and documents that impact the guardianship assets are appropriate. Provides a process for the clerk to request a court order based on an affidavit that identifies records and documents requested and a show of good cause as to why there are needed to complete the audit. Provides a process for the clerk to issue a subpoena to nonparties for production of documents supported by an affidavit and notice requirements. Provides the guardian or ward a timeframe within which to object to the production of documents.

- B. **Amendments:**

None.